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case.

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**IN THE
COURT OF APPEALS OF INDIANA**

ERIC SMITH,)	
)	
Appellant-Defendant,)	
)	
vs.)	No. 49A05-0611-PC-628
)	
STATE OF INDIANA,)	
)	
Appellee-Plaintiff.)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Amy J. Barbar, Judge
Cause No. 49G02-0103-PC-051465

May 22, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

SHARPNACK, Judge

Eric Smith, pro se, appeals the trial court's denial of his motion to correct erroneous sentence. Smith raises one issue, which we revise and restate as whether the trial court abused its discretion by denying Smith's motion to correct erroneous sentence. We affirm.

The underlying facts, as stated in Smith's direct appeal, reveal that on February 23, 2001, Smith lit a fire on his ex-girlfriend's patio that destroyed twelve apartment units. Smith v. State, No. 49A04-0201-CR-31, slip op. at 1-6 (Ind. Ct. App. Nov. 19, 2002), trans. denied. The State charged Smith with nine counts of arson and one count of conspiracy to commit arson. Id. The jury found Smith guilty of nine counts of arson as class B felonies and one count of conspiracy to commit arson as a class B felony. Smith's convictions "merged" into one count arson as a class B felony, on which the trial court imposed a sentence of twenty years. On direct appeal, Smith argued that there was insufficient evidence to support his convictions. See Smith v. State, No. 49A04-0201-CR-31. This court affirmed the judgment of the trial court on November 19, 2002. Id.

Smith filed a petition for post-conviction relief on December 9, 2002, which the post-conviction court dismissed without prejudice on January 16, 2003. Smith v. State, No. 49A05-0409-PC-495, slip op. at 6 (Ind. Ct. App. April 13, 2006), reh'g denied. On February 27, 2004, Smith filed an amended second petition for post-conviction relief, alleging that he was denied effective assistance of trial and appellate counsel because an alleged alibi witness was not called to testify, he had discovered evidence that undermined confidence in the trial's outcome, he had discovered impeachment evidence,

and appellate counsel decided not to challenge his sentence on direct appeal. Id. After a hearing, the post-conviction court denied Smith’s petition on August 2, 2004, and Smith appealed. Id. at 7. This court affirmed the judgment of the post-conviction court. See id. at 18.

On September 14, 2006, Smith filed a motion to correct erroneous sentence. Smith argued that the trial court exceeded its authority by enhancing Smith’s sentence pursuant to Ind. Code § 35-38-1-7.1 (2001),¹ which governs a trial court’s considerations in imposing sentence. Smith also argued that the sentencing statutes relied upon by the trial court during sentencing “violated the Sixth and Fourteenth Amendment to the United States Constitution of America” and that “Article I, Section 12 of the state constitution provides remedy and judicial review to correct this error.” Appellant’s Appendix at 72. The trial court denied Smith’s motion.

The issue is whether the trial court abused its discretion by denying Smith’s motion to correct erroneous sentence. We review a trial court’s decision on a motion to correct erroneous sentence “only for abuse of discretion.” Mitchell v. State, 726 N.E.2d 1228, 1243 (Ind. 2000), reh’g denied, overruled on other grounds by Robinson v. State,

¹ Subsequently amended by Pub. L. No. 17-2001, § 12 (eff. July 1, 2001); Pub. L. No. 280-2001, § 51 (eff. July 1, 2001); Pub. L. No. 133-2002, § 61 (eff. July 1, 2002); Pub. L. No. 221-2003, § 16 (eff. July 1, 2003); Pub. L. No. 71-2005, § 3 (eff. April 25, 2005); Pub. L. No. 213-2005, § 3 (eff. May 11, 2005).

805 N.E.2d 783, 787 (Ind. 2004). An abuse of discretion occurs when the trial court's decision is against the logic and effect of the facts and circumstances before it. Myers v. State, 718 N.E.2d 783, 789 (Ind. Ct. App. 1999).

Ind. Code § 35-38-1-15 (2004), which governs a motion to correct erroneous sentence, provides:

If the convicted person is erroneously sentenced, the mistake does not render the sentence void. The sentence shall be corrected after written notice is given to the convicted person. The convicted person and his counsel must be present when the corrected sentence is ordered. A motion to correct sentence must be in writing and supported by a memorandum of law specifically pointing out the defect in the original sentence.

In Robinson, the Indiana Supreme Court addressed the difference between a motion to correct erroneous sentence and a petition for post-conviction relief and held that “a motion to correct sentence is available only to correct sentencing errors clear from the face of the judgment.” Robinson, 805 N.E.2d at 794.

When claims of sentencing errors require consideration of matters outside the face of the sentencing judgment, they are best addressed promptly on direct appeal and thereafter via post-conviction relief proceedings where applicable. Use of the statutory motion to correct sentence should thus be narrowly confined to claims apparent from the face of the sentencing judgment, and the “facially erroneous” prerequisite should henceforth be strictly applied We therefore hold that a motion to correct sentence may only be used to correct sentencing errors that are clear from the face of the judgment imposing the sentence in light of the statutory authority. Claims that require consideration of the proceedings before, during, or after trial may not be presented by way of a motion to correct sentence.

Id. at 787. Thus, a motion to correct sentence can be used to correct errors such as “illegal sentences in violation of express statutory authority or an erroneous interpretation

of a penalty provision of a statute,” but will not be available for claims raising “constitutional issues or issues concerning how the trial court weighed factors in imposing sentence.” Id. at 786.

In addition to limiting a motion to correct sentence to errors apparent on the face of the judgment, Indiana case law has long emphasized that “the preferred procedure is by way of a petition for post-conviction relief.” This emphasis that post-conviction proceedings are “preferred” for raising sentencing error should not be understood to imply that the statutory motion to correct sentence is nevertheless permissible to raise claims that are not facially evident on the judgment. It is not. This Court “tries to encourage conservation of judicial time and energy while at the same time affording speedy and efficient justice to those convicted of a crime.” As to sentencing claims not facially apparent, the motion to correct sentence is an improper remedy. Such claims may be raised only on direct appeal and, where appropriate, by post-conviction proceedings.

Id. at 787 (footnote and internal citations omitted).

On appeal, Smith argues that: (1) his sentence was facially defective because Ind. Code § 35-38-1-7.1 encourages leniency towards defendants who have not previously been through the criminal justice system and this was his first time through the system; and (2) Blakely v. Washington, 542 U.S. 296, 124 S. Ct. 2531 (2004), reh’g denied, and Smylie v. State, 823 N.E.2d 679 (Ind. 2005), cert. denied, 126 S. Ct. 545 (2005), apply retroactively due to Article I, sections 12 and 23 of the Indiana State Constitution. Each of these arguments require consideration of matters in the record outside the face of the judgment.² See Fulkrod v. State, 855 N.E.2d 1064, 10 (Ind. Ct. App. 2006) (holding that

² We were not provided with the sentencing judgment in appellant’s appendix, and we base this decision on the CCS entry.

a Blakely claim is not the type of claim that may be brought through a motion to correct erroneous sentence).³ Consequently, Smith's arguments were not properly presented by way of a motion to correct erroneous sentence, and the trial court did not abuse its discretion by denying Smith's motion to correct erroneous sentence. See, e.g., Jackson v. State, 806 N.E.2d 773, 774 (Ind. 2004) (holding that the trial court properly denied the defendant's motion to correct erroneous sentence because a motion to correct sentence is available only to correct sentencing errors clear from the face of the judgment).

For the foregoing reasons, we affirm the trial court's denial of Smith's motion to correct erroneous sentence.

Affirmed.

SULLIVAN, J. and CRONE, J. concur

³ We note that because Smith's case was not pending upon direct review and because the judgment was final when Blakely was decided, Blakely does not apply retroactively to Smith's case. See Fulkrod, 855 N.E.2d at 1067.